Orange County Publications, an unincorporated division of Ottoway Newspapers, Inc., d/b/a The Times-Herald Record *and* Communications Workers of America, Local 1120, AFL–CIO. Case 34–CA–8656

May 11, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on January 12, 1999, the General Counsel of the National Labor Relations Board issued a complaint on February 9, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide reasonable access to its facility following the Union's certification in Case 34–RC–1539. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting defenses.

On March 25, 1999, the General Counsel filed a Motion for Summary Judgment. On March 30, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Union was certified as the representative of the unit here involved after a second election. In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the grounds that the results of the first election should have been certified and no second election held.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment insofar as the complaint alleges that the Respondent has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an unincorporated division of a Delaware corporation, with an administrative office and separate production facility located in Middletown, New York, has been engaged in the publication of a daily newspaper in Middletown, New York. During the 12-month period ending January 31, 1999, the Respondent, in conducting its operations described above, purchased and received at its Middletown facility goods valued in excess of $50,000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail-ballot election held in the period from March 25 to April 6, 1998,[3] and a second election held on November 10, 1998, the Union was certified on November 18, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] As stated in her separate opinion, Member Fox joins Member Liebman in granting the Motion for Summary Judgment on this complaint allegation. Member Brame would deny the Motion for Summary Judgment in its entirety for the reasons set forth in his dissenting opinion.

A different majority of the Board, consisting of Members Liebman and Brame, effectively denies the General Counsel's Motion for Summary Judgment on the complaint allegations that the Union requested that the Respondent "provide reasonable access to [its] facility," and that the Respondent failed and refused "to provide reasonable access to [its] facility" in violation of Sec. 8(a)(5). Member Liebman finds that the Respondent's denials of these complaint allegations raise material issues of fact that can only be resolved at a hearing. Although Member Liebman agrees with Member Fox that union access to the employer's premises is a mandatory subject of bargaining, Member Liebman observes that the theory of the General Counsel's complaint and summary judgment motion is not that the Respondent unlawfully refused to *bargain* over an access proposal, but rather that the Respondent unlawfully refused to *grant* access. The General Counsel's argument, that "Respondent's blanket refusal to grant reasonable access to its facility to the exclusive collective bargaining representative of its employees, without any explanation for such denial, clearly violates the Act," may be litigated before the judge. Member Brame's rationale for denying summary judgment is set forth in his dissent. Accordingly, this issue is remanded to the Regional Director for further appropriate action.

[2] Although the Respondent's answer states that the Respondent lacks information sufficient to form a belief as to the truth or falsity of the Union's status as a labor organization, we do not find that the Respondent's allegation raises an issue warranting a hearing. In the underlying representation case, the Regional Director found the Union to be a labor organization and the Respondent did not seek review of that finding. See Sec. 102.67(f) of the Board's Rules ("Failure to request review shall preclude . . . parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.").

[3] On September 29, 1998, the Board issued a decision adopting the hearing officer's recommendation that the first election be set aside and a second election held.

> All full-time and regular part-time bulk newspaper delivery drivers, including the shipping and receiving driver, the commercial printing driver, and couriers employed by the Respondent at its Smith and Ballard Road facility in Middletown, New York; but excluding all mailroom employees, print shop employees, mechanics, machine operators, motor route delivery drivers, and guards, professional employees, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since November 20, 1998, the Union, by letter, has requested the Respondent to bargain and, since December 8, 1998, the Respondent has refused. We find the refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after December 8, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Orange County Publications, an unincorporated division of Ottoway Newspapers, Inc., d/b/a The Times-Herald Record, Middletown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Communications Workers of America, Local 1120, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time bulk newspaper delivery drivers, including the shipping and receiving driver, the commercial printing driver, and couriers employed by the Respondent at its Smith and Ballard Road facility in Middletown, New York; but excluding all mailroom employees, print shop employees, mechanics, machine operators, motor route delivery drivers, and guards, professional employees, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Middletown, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 34 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER FOX, dissenting in part.

I join Member Liebman in granting the General Counsel's Motion for Summary Judgment on the complaint allegation that the Respondent has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. I would also find that the Respondent's flat rejection of the Union's proposal for

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

granting access of union agents to the Respondent's breakroom during specified hours to meet with the drivers was an additional violation of the duty to bargain. It is settled that access of agents of a collective-bargaining representative to an employer's premises for purposes related to representation of the unit employees is a mandatory subject of bargaining. *Applebaum Industries*, 294 NLRB 981, 982 fn. 9 (1989), and cases there cited. Thus, while it is true that a union's entitlement to access at particular times and places for particular purposes raises factual issues which cannot necessarily be decided on summary judgment, an employer is not free to respond to an access proposal that is not unreasonable on its face simply by rejecting it out of hand and making no counterproposal. The Respondent's reply to the Union's access proposal here was, therefore, part and parcel of its refusal to bargain, and I would grant the General Counsel's Motion for Summary Judgment on that allegation as well.

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from my colleagues' adoption of the hearing officer's recommendation to sustain the Union's Objections 1 and 2 and to set aside the first election. Instead, I would have overruled those objections on the basis that the Respondent's statement at issue constituted at most legitimate commentary regarding the likely consequences of unionization on the Respondent. See *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617–618 (1969). Accordingly, I would have issued a certification of results of the first election. I therefore dissent here from my colleagues' granting the General Counsel's Motion for Summary Judgment and their finding that the Respondent violated Section 8(a)(5) and (1) of the Act in this certification-testing proceeding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Communications Workers of America, Local 1120, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time bulk newspaper delivery drivers, including the shipping and receiving driver, the commercial printing driver, and couriers employed by us at our Smith and Ballard Road facility in Middletown, New York; but excluding all mailroom employees, print shop employees, mechanics, machine operators, motor route delivery drivers, and guards, professional employees, and supervisors as defined in the Act.

ORANGE COUNTY PUBLICATIONS, AN UNINCORPORATED DIVISION OF OTTOWAY NEWSPAPERS, INC., D/B/A THE TIMES-HERALD RECORD